



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 23 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was recommended for approval by the Director, Nebraska Service Center (Director), who certified the case for review to the Chief, Administrative Appeals Office (AAO). The Director's decision was withdrawn, and the petition denied, by the AAO. The petition is now before the AAO on a motion to reopen and a motion to reconsider. The motion(s) will be dismissed.

The petitioner is a health care business. It filed an Immigrant Petition for Alien Worker, Form I-140, on January 6, 2011, seeking to employ the beneficiary permanently in the United States as a speech language pathologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. "Advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

As required by statute, the petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, which had been filed with the U.S. Department of Labor (DOL) on March 8, 2010 (the priority date of the Form I-140 petition), and certified by the DOL on July 12, 2010. In Part H of the ETA Form 9089 (labor certification) the employer/petitioner set forth the minimum requirements to qualify for the proffered position. They consist of a master's degree or a "foreign educational equivalent" in audiology and speech language pathology and a license in speech language pathology (Part H, boxes 4, 4-B, 9, and 14). No training or experience is required (Part H, boxes 5 and 6). The labor certification also specifies that no alternate combination of education and experience is acceptable (Part H, box 8).

As evidence of the beneficiary's educational credentials the petitioner submitted photocopies of her academic record in India, which shows that she was awarded two degrees from [REDACTED] including (1) a Bachelor of Science & Hearing on January 24, 2003, after completion of a three-year degree program, and (2) a Master of Science in Audiology and Speech Language Pathology on January 6, 2006, after completion of a two-year degree program. The petitioner also submitted a copy of the beneficiary's Speech-Language Pathologist license, issued by the State of California's Speech-Language Pathology and Audiology Board (SLPAB) on April 15, 2009.

On January 12, 2012, the Director issued a decision recommending approval of the petition. In the Director's view, the beneficiary's education was equivalent to a U.S. master's degree in audiology and speech language pathology. Based on her education and state license, therefore, the Director concluded that the beneficiary meets the requirements of the labor certification and is eligible for classification as an advanced degree professional under section 203(b)(2) of the Act. The Director certified the case for review to the AAO.

On April 26, 2012, the AAO issued a Notice of Intent to Deny and Request for Evidence (NOID/RFE), indicating that it intended to withdraw the Director's recommended approval of the petition because the record did not establish that the beneficiary's Indian education is equivalent to a U.S. master's degree. In particular, the AAO cited information in the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), indicating that a two-year Master of Science degree in India that follows a three-year Bachelor of Science degree is comparable to a bachelor of science degree in the United States, not a U.S. master's degree. The AAO noted that the record established the petitioner's ability to pay the proffered wage in 2010, and requested additional evidence to establish its ability to pay the proffered wage in 2011 as well.

The petitioner responded to the NOID/RFE on May 31, 2012, with a brief and additional documentation addressing the issue of the U.S. equivalency of the beneficiary's Indian education. No evidence was submitted of the petitioner's ability to pay the proffered wage in 2011.

After reviewing the entire record, including all of the documentation submitted in response to the NOID/RFE, the AAO issued a decision on September 24, 2012, withdrawing the Director's recommended approval and denying the petition on three grounds:

1. The beneficiary does not have the requisite educational degree – specifically a U.S. master's degree or a "foreign equivalent degree" – to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.
2. The beneficiary does not qualify for the proffered position of speech language pathologist under the terms of the labor certification because she does not have the requisite educational degree – specifically a U.S. master's degree or a "foreign educational equivalent."
3. The petitioner did not establish its continuing ability to pay the proffered wage from the priority date (March 8, 2010) up to the present.

On October 24, 2012, the petitioner filed a Form I-290B, Notice of Appeal or Motion, which was identified on the form as a motion to reopen and a motion to reconsider. The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)]

policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As further provided in 8 C.F.R. § 103.5(a)(4):

A motion that does not meet applicable requirements shall be dismissed.

Among the documents submitted in support of the motion are photocopies of the petitioner's federal income tax returns, Forms 1120, and the beneficiary's wage and tax statements, Forms W-2, for the years 2010 and 2011. The Forms W-2 show that the beneficiary's gross pay from the petitioner (for whom she has worked since December 2007, according to the labor certification) amounted to \$80,253.92 in 2010 and \$78,966.06 in 2011. Both of these figures well exceeded the proffered wage of \$64,480.00 per year.¹ Based on this evidence the AAO concludes that the petitioner has established its continuing ability to pay the proffered wage from the priority date of the instant petition (March 8, 2010) up to the present, in compliance with the regulatory requirement at 8 C.F.R. § 204.5(g)(2). Accordingly, this ground for denial has been overcome, and the AAO will withdraw this part of its prior decision.

The petition will not be approved, however, because the evidence of record still does not establish that the beneficiary has the requisite education to be eligible for classification as an advanced degree professional and to qualify for the proffered position under the terms of the labor certification.

The majority of the petitioner's assertions in the pending motion reiterate arguments previously made in response to the NOID/RFE, which have already been considered by the AAO in its prior decision. They include the petitioner's claims that (1) licensing by the State of California as a speech language pathologist requires a master's degree; (2) the beneficiary's visa screening certification for the profession of speech-language pathologist by the International Commission on Healthcare Professionals (ICHP), a division of the Commission on Graduates of Foreign Nursing Schools (CGFNS), requires a master's degree; (3) the evaluation of the beneficiary's two Indian degrees by Education Credentials Evaluations, Inc. (ECE) concluded that they are equivalent to a U.S. bachelor's degree and a U.S. master's degree, respectively; (4) the beneficiary's Bachelor of Science degree in India should be found equivalent to a four-year bachelor's degree in the United States because some U.S. colleges and universities offer three-year baccalaureate programs and three-year Indian baccalaureates generally include more credit hours than four-year U.S. baccalaureates; (5) the article by [REDACTED] and [REDACTED] advocating that three-year bachelor's degrees followed by two-year master's degrees in India be accepted as equivalent to U.S. master's degrees; (6) an evaluation by AACRAO's database, EDGE, should not be given precedence over credential evaluation services utilized by the petitioner; and (7) the beneficiary is eligible for advanced degree classification under section 203(b)(2) of the Act based on the alternative combination of foreign

¹ The proffered wage in this case is calculated on the basis of the offered wage of \$31.00 per hour (ETA Form 9089, box G) times 2,080 hours in a standard work year.

education equivalent to a U.S. bachelor's degree in speech language pathology plus five years of progressive experience in the specialty. Each of these claims was rejected by the AAO in its prior decision. The pertinent language is incorporated by reference and will not be repeated in the instant decision. The petitioner has presented no new facts or documentation to refute the AAO's analysis of these claims, nor any persuasive argument and/or precedent decision(s) showing that the AAO's initial decision on any of these claims was based on an incorrect application of law or USCIS policy.

On motion the petitioner also claims that the DOL's Bureau of Labor Statistics and Occupational Outlook Handbook, as well as its O*Net Online resource, all state that a master's degree and a professional license are mandatory for speech language pathologists. The exhibits cited by the petitioner indicate that a master's degree is the "typical" or "standard" requirement for a speech-language pathologist, and that this profession is a "Job Zone 5" occupation in which most jobs require graduate education. Notwithstanding this general information from DOL, in the instant proceeding under U.S. immigration law it is USCIS that must determine whether the beneficiary's Indian education is equivalent to a U.S. master's degree. The AAO, as part of USCIS and the Department of Homeland Security, is not bound by the DOL's print and online resources, nor the decisions of a state licensing agency or a U.S. employer, in determining the U.S. equivalency of an alien's foreign education.

As explained in its prior decision, the AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even internal memoranda of USCIS do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") For the reasons described above, two additional documents submitted by the petitioner on motion – a book review on "AILA's² Focus on EB-2 & EB-3 Degree Equivalency" and a USCIS publication of questions and answers in connection with an AILA conference – have no binding effect on the AAO.

In support of its claim that the beneficiary has the foreign equivalent of a U.S. master's degree, the petitioner cites an unpublished decision issued by the AAO in another immigrant petition. The case involved a three-year bachelor's degree and a two-year master of science in physics from [REDACTED] in which the AAO found the Master of Science to be equivalent to a U.S. master's degree in physics. (LIN 06 164 51652, AAO decision Dec. 5, 2007.) As previously discussed, EDGE indicates that a two-year Master of Science degree in India that follows a three-year bachelor's degree is comparable to a bachelor's degree in the United States. The AAO

² AILA is the American Immigration Lawyers Association.

considers EDGE to be a reliable resource of information regarding the U.S. equivalency of foreign degrees, as expounded in our prior decision. The AAO is not bound in the instant proceeding by its decision on another Indian degree case from 2007. While the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions (like the one cited by counsel) are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a). Thus, the decision in the Indian degree case cited above is not a precedent, is not binding on the AAO, and is not persuasive evidence that the beneficiary's Master of Science in Audiology and Speech Language Pathology from [REDACTED] is equivalent to a U.S. master's degree in that field.

The petitioner cites two decisions by the Director, Nebraska Service Center, more recent than the AAO decision discussed above, which involved other petitions filed by [REDACTED] in the advanced degree professional classification. In those cases the beneficiaries, like the beneficiary in this proceeding, were found by the Director to have the equivalent of a U.S. master's degree based on a three-year bachelor's degree and a two-year master's degree in India. The petitions were initially denied by the Director on the ground that the beneficiaries did not have the equivalent of a U.S. master's degree, but on motions to reopen/reconsider filed in April and May 2010 were reversed in June 2010. The Director's decisions, however, are not binding on the AAO. Indeed, had the petitioners filed appeals to the AAO instead of motions to reopen and reconsider to the Director, the AAO by that point in time would likely have dismissed the appeals on the same grounds it has applied in the instant proceeding.

Finally, the petitioner asserts that the AAO should overlook the beneficiary's three-year bachelor's degree and find her Master of Science in Audiology and Speech Language Pathology to be a stand-alone equivalent to a U.S. master's degree in the field. The AAO is not persuaded. EDGE rates a two-year Master of Science degree in India, when it follows a three-year bachelor's degree, as comparable to a U.S. bachelor of science degree, not a U.S. master's degree. For the many reasons discussed in this decision and in the AAO's earlier decision, the petitioner has not offered a convincing rationale for the AAO to arrive at a different conclusion.

Thus, the petitioner has failed to overcome the first and second grounds for denial in the AAO's prior decision because it has not established that the beneficiary has a foreign equivalent to a U.S. master's degree in audiology and speech language pathology.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion(s), the movant has not met that burden. Therefore, the motion(s) will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

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ORDER: The third ground for denial in the AAO's decision of September 24, 2012, is withdrawn. The first two grounds for denial in the AAO's prior decision are affirmed. The motion to reopen and motion to reconsider are dismissed.